

St. John's Law Review

Volume 38
Number 1 *Volume 38, December 1963, Number 1*

Article 5

May 2013

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St. John's Law Review

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Recommended Citation

St. John's Law Review (1963) "The Changing Approach to "Trial by Newspaper"," *St. John's Law Review*.
Vol. 38 : No. 1 , Article 5.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol38/iss1/5>

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default judgment on the listed debt. The bankrupt petitioned that court under the cancellation statute and the judgment was cancelled. As to the third possibility, although no case law has been found, it would seem that if the bankrupt has appeared in a subsequent state action, the doctrine of *res judicata* would prevent him from utilizing the statute.

Conclusion

Varied solutions to the problem of what constitutes an "unusual circumstance" have been advanced. For some, proposed legislation provides the answer. Others believe that the Supreme Court should grant certiorari to the proper case in an effort to redefine the test with more precision. Yet, it should be borne in mind that the bankruptcy court, as a court of equity, requires a certain flexibility, lest the equitable remedy become frozen. The present test seems to provide that degree of elasticity necessary for a court of equity to grant relief when the remedy at law is inadequate and, perhaps, should not be so readily abandoned. Most of the problems that arise in this area could be averted if the attorney who represents the bankrupt in the bankruptcy proceeding would advise him as to the effect of his discharge.



THE CHANGING APPROACH TO "TRIAL BY NEWSPAPER"

One of the basic rights guaranteed by our Constitution is that one accused of a crime be afforded a fair trial by an impartial jury. This guarantee is made applicable to state prosecutions by the due process clause of the fourteenth amendment.¹ An essential ingredient of that right is that an accused be tried by jurors whose verdict is based solely upon a consideration of competent evidence received in open court.² However, as the incidence of crime reporting has increased,³ it has become difficult to empanel jurors who have not read something of the case. Often, the publicity to which they have been exposed will be extremely prejudicial.⁴

¹ *In re Murchison*, 349 U.S. 133 (1955); *In re Oliver*, 333 U.S. 257, 266-73 (1948).

² *People v. Sprague*, 217 N.Y. 373, 380, 111 N.E. 1077, 1080 (1916).

³ In discussing the amount of publicity attendant to a particular trial one writer commented that there were "Words enough, if put into book form, to make a shelf of novels 22 feet long." BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY*, 192, 193 (2d ed. 1951).

⁴ For a discussion of the type of publicity that precedes a sensational trial see SULLIVAN, *TRIAL BY NEWSPAPER* (1961); Issacs, *The Crime of Present Day Crime Reporting*, 52 J. CRIM. L., C. & P.S. 405 (1961).

The newspapers may have published information which would not be admitted into evidence. Or they may have described the accused in one of the familiar stereotypes, and revealed his past criminal record in detail. If a trial has sensational news value, the papers may be extremely partisan. These efforts, which often jeopardize an accused's right to an impartial trial, have been termed "trial by newspaper," and have been condemned as the "legitimate great-grandchild of ordeal by fire, water and battle."⁵ This note will examine the extent to which the courts have reversed convictions, where prejudicial publicity has been brought to the attention of jurors either before or after empanelment. This discussion will examine the power of state and federal courts to reverse convictions when a defendant claims that the prejudicial publicity resulted in a denial of a fair trial in violation of *due process*. It will also analyze the power of the federal courts to reverse federal convictions by virtue of their *supervisory power*.

Newspaper Prejudice

Studies have revealed that publicity is capable of producing opinions and attitudes.⁶ It would seem that these opinions may be formed in two ways. Either the publicity may directly influence the mind of a juror through his reading of the article or it may exert indirect influence through the formation of a community attitude.⁷ In the latter case, despite the fact that it is indirect, an impartial trial may be impossible in an atmosphere of intense community hostility.⁸

The psychological advantages and the lack of judicial control that newspaper publicity enjoys over evidence introduced in the courtroom support the conclusion that newspaper-produced prejudice may be common in the minds of the jurors. Psychologically, publicity is most effective when it appeals to emotions.⁹ Since newspaper publicity via misleading headlines and stereotypes has an emotional appeal, it is capable of exerting greater influence than the more rational material presented in the courtroom. In addition, publicity will be most persuasive when it does not encounter any opposition, that is, when it does not have to compete with opinions already formed through past knowledge.¹⁰ Since

⁵ Boldt, *Should Canon 35 Be Amended?*, 41 A.B.A.J. 55 (1955).

⁶ REPORT OF THE CRIME COMMISSION OF THE STATE OF NEW YORK, 307, 319-20 (1927).

⁷ WRIGHT, MASS COMMUNICATION: A SOCIOLOGICAL PERSPECTIVE 49-73 (1959).

⁸ Moore v. Dempsey, 261 U.S. 86 (1923).

⁹ MURPHY & NEWCOMB, EXPERIMENTAL SOCIAL PSYCHOLOGY 961, 977-79 (rev. ed. 1937).

¹⁰ *Id.* at 962; see Goldfarb, *Public Information, Criminal Trials And The Cause Celebre*, 36 N.Y.U.L. REV. 810, 837 (1961).

press coverage is usually confined to the commission of a crime and the apprehension of an accused, these accounts will be more effective, in that they represent the jurors' first exposure to the facts of the case, and will not have to replace any pre-conceived opinions.

From a legal viewpoint, newspaper reports, unlike evidence presented in a courtroom, are subject to neither the scrutiny of the trial judge, nor intensive cross-examination. Secondly, newspaper articles may contain facts, such as the prior criminal record of an accused or results of lie detector tests, which would be inadmissible in a courtroom. Facts introduced by these means are as damaging as if they had been actually admitted into evidence.

The Standard of Impartiality

At early American common law a juror was disqualified from service if he had formulated an opinion as to the guilt or innocence of an accused.¹¹ Soon however, as the mass publications expanded their circulation, this view was considered inadequate because, when a case was heavily publicized, it might have prevented the empaneling of a jury.¹² The criterion adopted was that a juror need not be dismissed if he had a preconceived opinion concerning the guilt or innocence of an accused; provided, however, that he could state to the court's satisfaction that he would lay aside this opinion, and render a fair and impartial verdict based solely on the evidence presented at the trial.¹³

This affirmation by a juror, and its acceptance by a trial judge, did not preclude an appellate court from considering whether the defendant had actually been denied due process. Thus, on appeal a conviction could be reversed if an accused showed "the actual existence of such an opinion in the mind of a juror as will raise the presumption of partiality."¹⁴ The question left unanswered was what facts would be sufficient to establish this presumption of partiality.

¹¹ *Greenfield v. People*, 74 N.Y. 277 (1878) (per curiam); *People v. Allen*, 43 N.Y. 28, 34 (1870); *People v. Miller*, 125 Cal. 44, 57 Pac. 770 (1899).

¹² *Holt v. United States*, 218 U.S. 245, 251 (1910); *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878).

¹³ *Spies v. Illinois*, 299 U.S. 131, 168-69 (1887); *Reynolds v. United States*, *supra* note 12. Many states have incorporated this standard into statutory form; see, e.g., N.Y. CODE CRIM. PROC. § 376(2); CAL. PEN. CODE § 1076.

¹⁴ *Reynolds v. United States*, *supra* note 12, at 157.

Due Process and the Impartial Jury Cases Prior to Irvin v. Dowd

The presence of extensive and prejudicial publicity in and of itself was insufficient to establish that an accused had been denied a fair trial.¹⁵ Nor could a conviction be reversed merely because some of the jurors had read the articles prior to trial.¹⁶ If the prejudicial material was read by the jurors while a trial was progressing, the instructions of a trial judge to disregard any opinion formed by the article was considered sufficient to insure the right of an accused to an impartial trial.¹⁷ This view met with some disagreement.¹⁸ Finally, if the reading of the publicity by the jurors during trial was known to a defendant, and he did not make a prompt objection, he was deemed to have waived his right to reversal on that ground.¹⁹ The courts granted a trial judge wide discretion on the issue of a juror's partiality, and his decision would be set aside only when clearly in error.²⁰

In *Stroble v. California*,²¹ the accused prior to trial was described as a "sex mad killer" and a "werewolf." The newspapers printed his confession along with the district attorney's statements that he was guilty, and that sex offenders should be treated in the same manner as mad dogs. The Court rejected Stroble's claim that he had been denied a fair trial and commented that he had failed "to prove that any juror was *in fact* prejudiced."²²

Many factors have been considered by appellate courts in their determination of whether a defendant had been denied a fair trial by reason of prejudicial publicity. In some cases the time lag between the publicity and the trial was considered important.

¹⁵ *People v. Broady*, 195 Misc. 349, 350, 90 N.Y.S.2d 864, 865 (Sup. Ct. 1949); *People v. Sandgen*, 190 Misc. 810, 813-14, 75 N.Y.S.2d 753, 757 (Sup. Ct. 1947).

¹⁶ *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926); *People v. Malmenato*, 4 Ill. 2d 52, 150 N.E.2d 806, *cert. denied*, 358 U.S. 899 (1958).

¹⁷ *United States v. Pisano*, 193 F.2d 355, 360-61 (7th Cir. 1951); *People v. Lubin*, 190 App. Div. 339, 179 N.Y. Supp. 691 (1st Dep't), *aff'd*, 229 N.Y. 601, 129 N.E. 924 (1920).

¹⁸ *Delaney v. United States*, 199 F.2d 107, 112 (1st Cir. 1952); *United States v. Leviton*, 193 F.2d 848, 866 (2d Cir. 1951) (dissenting opinion), *cert. denied*, 343 U.S. 946 (1952).

¹⁹ *State v. Lilja*, 155 Minn. 251, 193 N.W. 178 (1923); see *Langer v. United States*, 76 F.2d 817, 827-28 (8th Cir. 1935).

²⁰ The trial judge's discretion extends to all motions where the granting of such motions would presuppose a finding of partiality. *United States v. Moran*, 236 F.2d 361 (2d Cir.), *cert. denied*, 346 U.S. 821 (1956) (motion for change of venue); *Finnegan v. United States*, 204 F.2d 105 (8th Cir.), *cert. denied*, 346 U.S. 821 (1953) (motion for continuance); *United States v. Carruthers*, 152 F.2d 512, 519 (7th Cir. 1945) (motion for mistrial); *Leick v. People*, 136 Colo. 535, 322 P.2d 674 (1958) (challenge for cause).

²¹ 343 U.S. 181 (1952).

²² *Id.* at 195. (Emphasis added.)

If a significant period of time had intervened between the publicity and the trial its prejudicial nature was deemed to have lost its vitality, and the conviction would be upheld.²³ A new trial would, at times, not be granted unless it was likely that a defendant would have been acquitted but for the prejudicial publicity.²⁴ Sometimes, the office of the person who had revealed the information was significant. Thus, if the source was other than an agent of the prosecution, reversal was unlikely.²⁵ In addition, the action of a defense counsel was important. If he failed to ascertain on the *voir dire*, whether or not the jurors had read the publicity, the result of the lower court would usually not be changed.²⁶ Finally, when a defense counsel had failed to exercise all of his peremptory challenges,²⁷ or failed to move for a change of venue or continuance,²⁸ a court would generally infer that prejudice did not exist during the trial.

The majority of the cases had thus adopted the position that the decision of the trial judge was almost conclusive on the issue of partiality. Although they stated that it would be a denial of a fair trial if an accused showed *actual prejudice*, there was little indication of how this was to be established. Since partiality is a state of mind,²⁹ an accused could not show prejudice as an objective reality. Thus, the demand that it be *proven in fact* was a means to uphold the result of the lower court. Indicative of this viewpoint is the fact that the Supreme Court prior to *Irvin v. Dowd*³⁰ had not reversed a single conviction on the ground that a defendant had been denied an impartial trial by reason of prejudicial publicity.³¹

However, a few decisions indicated that a juror's statement of his ability to set aside a preconceived opinion should be rejected if it was psychologically untenable. These decisions proceeded on the theory that the publicity might be such as to prejudice anyone who read it, notwithstanding his good faith

²³ *United States v. Smith*, 306 F.2d 596, 603 (2d Cir. 1962) (3 months); *Palakiko v. Harper*, 209 F.2d 75, 98 (9th Cir. 1953) (11 weeks).

²⁴ *State v. Williams*, 96 Minn. 351, 105 N.W. 265 (1905). *Contra*, *Babb v. State*, 18 Ariz. 505, 163 Pac. 259 (1917).

²⁵ *Griffen v. United States*, 295 Fed. 437 (3d Cir. 1924); *People v. Becker*, 215 N.Y. 126, 152, 109 N.E. 127, 135 (1915); see *Stroble v. California*, 343 U.S. 181, 201 (1952) (dissenting opinion).

²⁶ *Gicino v. United States*, 212 F.2d 8, 10-11 (8th Cir.), *cert. denied*, 348 U.S. 884 (1954).

²⁷ Note, 27 U. CINC. L. REV. 87 (1958).

²⁸ *United States v. Rosenberg*, 200 F.2d 666, 669 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953); *Stunz v. United States*, 27 F.2d 575 (8th Cir. 1928).

²⁹ *United States v. Wood*, 299 U.S. 123, 145 (1936).

³⁰ 366 U.S. 717 (1961).

³¹ *Manes, Irvin v. Dowd: Retreat From Reality*, 22 LAW IN TRANSITION 46 (1962).

assertion to the contrary.³² Thus, the court in *Briggs v. United States*,³³ held that when adverse publicity was read by a juror during trial, a rebuttable presumption of prejudice arose.³⁴ Likewise, the court in *People v. Hyrciuk*³⁵ reversed a conviction of rape where the jurors read that the defendant had confessed to two previous murders, and the prosecution described him as a vicious degenerate. Reasoning that the jurors were incapable of knowing the effect which adverse publicity might have upon their unconscious minds, the court concluded that the nature and extent of the publicity was sufficient to create the inference of prejudice.

Irvin v. Dowd

In *Irvin v. Dowd*,³⁶ the defendant was convicted of murder. The Supreme Court, for the first time, reversed a state conviction on the basis that the jury had been prejudiced prior to trial by inflammatory publicity. The pre-trial publicity contained exhaustive details of the accused's criminal background. A roving reporter solicited opinions from the community as to the guilt or innocence of the accused, and the punishment he should receive. These were broadcast over local radio stations. Of the 370 people called for jury duty, ninety per cent expressed an opinion that the defendant was guilty. Of the twelve jurors eventually selected, eight stated similar opinions, although they *all* declared that they could lay aside their opinions and judge the accused on the basis of the evidence presented in the courtroom.³⁷

The Supreme Court reasserted that a juror could be impartial although he had formulated an opinion. However, despite the sincerity of the jurors' statements that they could judge the accused impartially, the Court concluded that partiality existed from the nature and extent of the publicity, which was evidenced by the *voir dire*. The Court stated that, "where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."³⁸

Thus, the Court rejected the practice of accepting jurors' declarations of impartiality as conclusive, and affirming convictions as a matter of course, despite the presence of prejudicial publicity. It indicated, as a few decisions had done previously, that upon

³² *Singer v. State*, 109 So. 2d 7 (Fla. 1959); *State v. Peirce*, 178 Iowa 417, 159 N.W. 1050 (1916); *State v. Claypool*, 135 Wash. 295, 237 Pac. 730 (1925).

³³ 221 F.2d 636 (6th Cir. 1955).

³⁴ *Id.* at 639.

³⁵ 5 Ill. 2d 176, 125 N.E.2d 61 (1954).

³⁶ 366 U.S. 717 (1961).

³⁷ *Id.* at 727.

³⁸ *Id.* at 728.

the presentation of certain facts a court would conclude that prejudice existed despite a juror's declaration to the contrary. However, the question remained whether this decision would be limited to factual patterns which were similarly extreme, or whether it would be applied more generally to the situations where prejudicial material had come to the attention of a juror.

Recent Developments

Some of the decisions following *Irvin* seemed to limit it to its extreme factual pattern. Thus, in *Beck v. Washington*,³⁹ the Court affirmed a state conviction of Dave Beck despite the fact that the chairman of a Senate committee released some derogatory statements to the press.⁴⁰ The Court distinguished *Irvin* on the ground that in that case ninety per cent of the prospective jurors were of the opinion that the defendant was guilty.⁴¹

A sharper limitation of *Irvin* was made in *Geagan v. Gavin*.⁴² The court held that the defendant had not been denied a fair trial in the state court. To support this conclusion, they noted that the publicity did not arouse feelings of rage and vengeance⁴³ as it did in *Irvin*. They observed that here only seventy-two per cent rather than ninety per cent of the prospective jurors, and two rather than eight of the jurors selected, admitted preconceived opinions. According to this interpretation, the appellate review would offer little protection to an accused who was injured by prejudicial publicity. To establish grounds for reversal he would have to prove that the publicity was sufficiently widespread and inflammatory to incite vengeance in the community, that this feeling was reflected in the overwhelming majority of the persons interviewed on the *voir dire* and the jurors eventually selected.

On the other hand, there is marked opinion writing indicating that the *Irvin* decision will be applied more freely to situations where there is less extensive prejudicial publicity. In *United States ex rel. Bloeth v. Denno*,⁴⁴ the defendant was convicted of murder. Prior to trial, publicity engendered by the district attorney degrading the defense of insanity was read by some of the eventual jurors. In granting a writ of habeas corpus, the court

³⁹ 369 U.S. 541 (1962).

⁴⁰ *Id.* at 542-45.

⁴¹ *Id.* at 557. Many cases relied on this decision to affirm convictions, despite the fact that there was extensive publicity. See, e.g., *Dranow v. United States*, 307 F.2d 545, 564 (8th Cir. 1962); *United States v. Decker*, 304 F.2d 702, 704 (6th Cir. 1962).

⁴² 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1963).

⁴³ *Id.* at 247.

⁴⁴ 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963).

indicated that merely obtaining assurances of impartiality from the jurors is insufficient. The final test is whether the federal judiciary "is satisfied that the jurors were in fact capable of, and did lay aside their preconceived judgment."⁴⁵ After reviewing the character and extent of the publicity, the court concluded that it was *impossible* for the jurors to lay aside their preconceived opinions. Thus, the majority refused to accept the view, as did the dissent, that the *Irvin* decision was limited to "truly exceptional circumstances."⁴⁶

Of even greater consequence is the recent Supreme Court case of *Rideau v. Louisiana*.⁴⁷ Here a film interview of the defendant, confessing to the sheriff, was televised on three separate occasions. It was estimated that this interview reached a vast majority of the community in which the trial was to be held, and three members of the jury admitted seeing it. The Supreme Court reversed the conviction. *Without any extensive review of the voir dire*,⁴⁸ the Court concluded that the pre-trial publicity was so prejudicial that the confession amounted to the trial, and the subsequent court proceedings were "but a hollow formality."⁴⁹

In retrospect, although there is some confusion, there appears to be a movement in the federal courts to afford an accused greater protection from the danger of "trial by newspaper." There has been less reliance placed on the juror's declaration of impartiality, and more significance placed on the prejudicial nature of the publicity itself. Where the material read by a juror, either prior to or after empanelment, is sufficiently prejudicial, a court is likely to find that partiality existed despite a juror's statement to the contrary. However, because of the initial confusion, the state courts have, as yet, shown little inclination to follow this movement, and instead have limited *Irvin* to its facts.⁵⁰

⁴⁵ *Id.* at 371.

⁴⁶ *Id.* at 376.

⁴⁷ 373 U.S. 723 (1963).

⁴⁸ "But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" *Id.* at 727.

⁴⁹ *Id.* at 726. Mr. Justice Clark, in his dissent, protested that the *Irvin* rationale should not be employed except where the circumstances are "unusually compelling." *Id.* at 733.

⁵⁰ See, e.g., *People v. Genovese*, 10 N.Y.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962); *State v. Rogers*, 241 La. 841, 132 So. 2d 819, *cert. denied*, 370 U.S. 963 (1961); *State v. Belt*, 111 N.W.2d 588 (S.D. 1961).

*The Federal Supervisory Power and the Impartial Trial**Marshall v. United States*

When the Supreme Court is presented with a state conviction, it can only reverse such a conviction when it finds that the prejudicial publicity has resulted in a denial of a fair trial in violation of the due process clause. However, when prejudicial publicity has interfered with a trial in a federal court, the Supreme Court need not find a violation of due process, but can reverse such a conviction in the exercise of its general supervisory power over the lower federal courts.

In *Marshall v. United States*,⁵¹ the defendant had been convicted of dispensing drugs without a prescription in violation of a federal statute. The government attempted to introduce evidence that the defendant had previously practiced medicine without a license. The trial judge ruled that this evidence was inadmissible. Subsequently, some of the jurors read the same material in the newspapers. On questioning by the trial judge, each stated that he would not be influenced by the publicity and that he could decide the case on the evidence presented. The trial judge then denied the defendant's motion for mistrial. The Supreme Court reversed the conviction.

The Court first reasoned that since the evidence was sufficiently prejudicial to warrant its exclusion by the trial judge, its prejudicial effect on the jurors would not be lessened if it were read in the newspapers. The Court then reversed the conviction on the basis of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts."⁵² The *Marshall* decision, in essence, required reversal of convictions where evidence which had been explicitly excluded because of its prejudicial nature⁵³ was read by jurors. While the decision might have had limited value as precedent, since it could have been interpreted as only applying to its peculiar facts, this has not been the case.

⁵¹ 360 U.S. 310 (1959).

⁵² *Id.* at 313.

⁵³ It would seem that if evidence were excluded because irrelevant, there would be no grounds for reversal. *Oxenberg v. State*, 362 P.2d 893 (Alaska), *cert. denied*, 368 U.S. 56 (1961); see *United States v. Accardo*, 298 F.2d 133, 136 (7th Cir. 1962).

Recent Developments

The cases decided since *Marshall* indicate a wide application of the rule.⁵⁴ In *United States v. Dellanmura*,⁵⁵ the district court relying on *Marshall*, declared a mistrial where some of the jurors had seen a photograph of the defendant published in a newspaper bearing the caption "ex-convict." This decision is especially revealing since the Court of Appeals for the Second Circuit, prior to *Marshall* had upheld the denial of such a motion in cases involving equally prejudicial information.⁵⁶ Likewise in *Coppedge v. United States*,⁵⁷ the court reversed a conviction where some of the jurors had read that a witness was "deathly afraid" of the defendant because he had pistol-whipped his brother. It is significant that these decisions have applied *Marshall* in cases where the prosecution did not attempt to introduce the prejudicial information into evidence.

In addition, there is dicta to the effect that the *Marshall* decision might require reversal in cases where individuals have read prejudicial publicity prior to trial, and had then served as jurors.⁵⁸ Furthermore, while the decision is not mandatory on the state courts, at least one state has felt constrained to distinguish it.⁵⁹

Comparison

It is true that the standards established by the Supreme Court for assuring criminal justice in the federal courts are not necessarily limited by constitutional considerations.⁶⁰ Nonetheless, the fact remains that a defendant in a federal prosecution is

⁵⁴ *Janko v. United States*, 366 U.S. 716 (1961), reversing, 281 F.2d 156 (8th Cir. 1960); *United States v. Accardo*, supra note 53. For a discussion of the *Janko* rationale see Manes, *Irvin v. Dowd: Retreat From Reality*, 22 LAW IN TRANSITION 46, 52-53 (1962).

⁵⁵ 142 N.Y.L.J., July 8, 1959, p. 3, col. 3-4.

⁵⁶ *United States v. Weber*, 197 F.2d 237 (2d Cir.), cert. denied, 344 U.S. 834 (1952) (newspapers alleged that the defendant had a prior criminal record and published a scandalous cartoon); *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951), cert. denied, 343 U.S. 946 (1952) (newspapers reported that the defendant had offered a bribe to an important witness for the prosecution); *United States v. Hirsch*, 74 F.2d 215 (2d Cir.), cert. denied, 295 U.S. 739 (1934) (publicity alleged that one of the defendants was involved in a scheme to bribe the assistant to the attorney general).

⁵⁷ 272 F.2d 504 (D.C. Cir. 1959).

⁵⁸ *Rideau v. Louisiana*, 373 U.S. 723, 728-29 (1963) (dissenting opinion); *United States ex rel. Brown v. Smith*, 306 F.2d 599, 603 (2d Cir. 1962). But cf. *United States v. Shaffer*, 291 F.2d 689 (7th Cir.), cert. denied, 368 U.S. 915 (1961).

⁵⁹ *Oxenberg v. State*, supra note 53.

⁶⁰ *MacNabb v. United States*, 318 U.S. 332, 341 (1943).

afforded greater protection from prejudicial publicity by virtue of the *Marshall* precedent than his counterpart in a state court under the standard of the due process clause of the fourteenth amendment.⁶¹ When a defendant is prosecuted in a federal court, he will only have to prove that the jurors had read material which would have been excluded as evidence because of its prejudicial nature. He will not have to show that the jurors were, in fact, prejudiced by the information. Even if a court does not apply *Marshall* because of the impropriety of establishing a general rule as to the factual pattern at hand, it could still reverse a conviction on the ground that a defendant had been denied due process by reason of the prejudicial publicity.

However, when a federal court reviews a state conviction, it has no such option, since the federal supervisory power does not apply to state courts. Thus, a defendant will have to establish sufficient facts for the court to find that the existing prejudice denied him a fair trial in violation of the due process clause. Depending upon the interpretation placed on *Irvin*, this burden of proof might be quite severe. Certainly, the publicity would have to be more intensive, and its influence on the jury more definite, in order to obtain reversal of a conviction under due process than under federal supervisory power.

Critique

The Reliability of a Juror's Declaration of Impartiality

To a considerable extent, those courts which refuse to reverse convictions, even where extensive prejudicial publicity has been read by a juror, rely on the juror's own declaration of impartiality to protect a defendant's right to a fair trial. However, the validity of such an assumption is quite doubtful.

Initially, impartiality will be maintained only if it is assumed that all exposure to prejudicial publicity operates on the conscious mind. For if a juror is unaware of his unconscious prejudice, then his declaration of impartiality will not be as reliable as it might appear.⁶² Psychology has revealed that prejudice may be

⁶¹ Manes, *supra* note 54, at 53.

⁶² Some decisions have recognized that the prejudicial publicity may have a substantial effect on the unconscious mind of the juror. In *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961), the Court stated that, "the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Likewise in *Delaney v. United States*, 199 F.2d 107, 112-13 (1st Cir. 1952), the court stated, "one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity."

subtle and unconscious rather than open.⁶³ Even if it be assumed that all influence of publicity will reach a conscious level, there is reason to doubt that an individual who has formulated an opinion can cast it aside and judge independently on the facts. More likely than not, if the opinion is emotionally formed, the juror, albeit conscientious, will place the burden on the defendant to convince him of his innocence and will resolve all doubts against him.⁶⁴ In effect, this shifts the burden of proof from the prosecution to the defendant thus defeating the benefit he derives from the presumption of innocence.

Finally, reliance on a juror's declaration presumes that all jurors who recognize their prejudice will reveal it upon questioning. Since jurors are average men, it is not unreasonable that many will conceal the truth⁶⁵ due to a reluctance to admit before their fellow jurors that they are prejudiced.⁶⁶ Even if a juror is honest, the questions propounded by the trial judge are often suggestive of their own answers.⁶⁷ Certainly, a juror who is told that it is his constitutional duty to set aside any opinion, may feel constrained to overestimate his ability to cast aside prejudice.

⁶³ See generally HALL & LINDZEY, *THEORIES OF PERSONALITY*, 29-110 (1957); HOLLINGSWORTH, *JUDGING HUMAN CHARACTER* (1932); SYMONDS, *DIAGNOSING PERSONALITY AND CONDUCT* (1931).

⁶⁴ *People v. Hryciuk*, 5 Ill. 2d 176, 125 N.E.2d 61 (1954).

⁶⁵ "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, *supra* note 62, at 728.

⁶⁶ It is because of this reluctance that some courts have demanded that, where prejudicial publicity has been read by the jurors, they must be interrogated separately to determine the influence of the publicity. *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962); *Coppedge v. United States*, 272 F.2d 504 (D.C. Cir. 1959).

⁶⁷ See *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1963), where the trial judge questioned as follows:

"Q. If you are accepted as a juror, an oath will be administered to you that you will well and truly try the issues between the Commonwealth and these defendants, according to the evidence, which means that you should serve with an open mind and decide the case purely on the evidence as it will be presented here, uninfluenced by any preconceived notion, ideas or opinions that you may now have. Do you think that you could take that oath and adhere to it faithfully? A. I do, your Honor." *Id.* at 248. For similar type of questioning see *Lauderdale v. State*, 233 Ark. 96, 343 S.W.2d 422 (1961). In *Coughlin v. People*, 144 Ill. 140, 33 N.E. 1 (1893), the court reversed a conviction where it appeared that the juror's declaration of impartiality was elicited by the court's argumentative and persuasive examination.

Policy Considerations

The major policy reason asserted by the courts for limiting reversals to extreme factual patterns is that any other standard would make empanelment of a jury difficult.⁶⁸ However, the *Marshall* decision has apparently not created havoc in federal prosecutions. In addition, a more liberal application of the *Irvin* decision to less severe situations, where there is some evidence that jurors have been influenced by prejudicial publicity, would seem to have some advantageous policy results.

One of these might occur where a defendant moves for a change of venue or continuance on the ground of hostile publicity. Thus far, the trial courts have been extremely reluctant to grant such motions.⁶⁹ But now, if the *Irvin* rationale is applied broadly, trial courts may grant such relief more readily, if only out of a fear of reversal. While a more liberal employment of these means will not insure an impartial trial, they may be helpful where the publicity is of a local nature or is likely to subside in a short time.⁷⁰

In addition, this policy might make district attorneys reluctant to release information to the newspapers pending trial.⁷¹ A prosecutor, faced with a possible reversal due to his release of inflammatory material, might be hesitant to release such information. Undoubtedly, since the greatest source of prejudicial information published by the newspapers stems from the police and prosecution, this threat of reversal will substantially reduce the amount of inflammatory material actually published.

Conclusion

In recent years, there has been increasing sensitivity, at least in the Supreme Court, for the need to protect a defendant's right to an impartial trial. Certainly where the prosecution arises in the federal courts, the *Marshall* decision affords a defendant some measure of protection. Where the prosecution arises in state courts, it is difficult to ascertain what quantum of evidence must

⁶⁸ *United States v. Keegan*, 141 F.2d 248, 258 (2d Cir. 1944); *Wolfe v. Nash*, 205 F. Supp. 219, 226 (W.D. Mo. 1962), *aff'd*, 313 F.2d 393 (8th Cir. 1963).

⁶⁹ *Rakes v. United States*, 169 F.2d 739, 746-47 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948); *United States v. Dioguardi*, 20 F.R.D. 33 (S.D.N.Y. 1956) (denial of motion for change of venue); *United States v. Hoffa*, 156 F. Supp. 495 (S.D.N.Y. 1957); *United States v. Sterns*, 140 F. Supp. 761, 768 (S.D.N.Y. 1956) (denial of motion for continuance).

⁷⁰ For a discussion of the effectiveness of these motions to secure an impartial trial see Note, 60 COLUM. L. REV. 349, 360-70 (1960).

⁷¹ District Attorney Hogan has already made an office rule prohibiting the release of confessions to the newspapers prior to trial. 131 N.Y.L.J., April 22, 1954, p. 4, col. 3-4.

be presented to the court to warrant a finding of partiality. However, if the appellate courts are to fulfill honestly the requirement of a *de novo* examination on the issue of partiality, then they cannot wholly rely on a juror's own estimation of his ability to set aside a preconceived opinion.⁷² Rather, equal weight should be given to the nature and extent of the publicity, and the record of the *voir dire*. Of course, where the publicity is of such a prejudicial nature that it would be psychologically impossible for jurors to be impartial after exposure to it, reversal should be granted.

Ultimately, reversal of convictions will not eliminate the continued publication of inflammatory material. The economic advantages reaped by newspapers from sensational crime-reporting are too great for them to abandon such type of publicity.⁷³ Many measures have been suggested to control "trial by newspaper." Among the most promising are a greater use of the contempt power,⁷⁴ a more stringent enforcement of the canon of the American Bar Association prohibiting lawyers from giving information to newspapers on pending prosecutions,⁷⁵ and a more useful employment of the right of a defendant to waive a public trial.⁷⁶

Until these remedies become effective, a defendant's only recourse, when he has been denied his right to an impartial trial, is an appeal for relief to an appellate court. If the recent trend

⁷² *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *United States v. Smith*, 306 F.2d 596, 602 (2d Cir. 1962).

⁷³ There is a high correlation between the amount of crime news and both the amount of advertising and the paper's circulation. Caldwell, *Sensational News in the Modern Metropolitan Newspapers*, 23 J. CRIM. L. & CRIMINOLOGY 191, 203 (1932); Holmes, *Crime and the Press*, 20 J. CRIM. L. & CRIMINOLOGY 246, 289 (1929).

⁷⁴ By citing for contempt any publication tending to interfere with an impartial decision of a case, the English courts have largely eliminated trial by newspaper. On the other hand, in the United States, Supreme Court decisions have greatly limited any effective employment of the contempt power over newspapers. SULLIVAN, *CONTEMPT BY PUBLICATION* (3d ed. 1941); Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935); Hanson, *The Supreme Court on Freedom of the Press and Contempt by Publication*, 27 CORNELL L.Q. 165 (1942); Note, 13 W. RES. L. REV. 147 (1961).

⁷⁵ ABA Canons of Professional Ethics No. 20 states: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts. . . . Generally they are to be condemned. . . . An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement." For a discussion of this canon see Symposium, *Fair Trial and Freedom of the Press*, 19 F.R.D. 16, 40-43 (1955).

⁷⁶ Mueller, *Problems Posed By Publicity To Crime And Criminal Proceedings*, 110 U. PA. L. REV. 1, 23-26 (1961).

of the Supreme Court is followed, this right will be protected with some measure of diligence.



AIRPLANE NOISE ABATEMENT — COMMUNITY INITIATIVE AND THE CONSTITUTION

Airplane noise has constantly plagued persons residing on property situated near airports. Aircraft, when passing over these neighboring homes emit noise of high intensity.¹ The results are a frequent interference with domestic activity and, at times, injuries to both person and property.² Two new developments, moreover, will increase the discomfort already sustained. The first, a general increase in air activity, will in all probability be responsible for increased disturbances.³ Secondly, the jets introduced by the commercial carriers will emit noise at a greater intensity than propeller driven aircraft and their flatter glide angles will spread the noise over a longer radius.⁴

In the past, these property owners have sought relief through actions for trespass and nuisance. When the defendant was a governmental body, relief was sought for an uncompensated taking of land.⁵ The individual lawsuits, however, did not solve the noise problem. Rather, they were somewhat analogous to a doctor treating a patient's symptom while neglecting his disease. In the face of this probable increase in airplane noise, the question arises as to whether the community, rather than the individual landowners, should take the initiative in dealing with the problem. At least one community has realized the need for group action, and has attempted to control the problem through legislation. This attempt, however, was found to have exceeded constitutional limitations.⁶ The purpose of this note, therefore, will be to

¹ America, Jan. 21, 1961, p. 546.

² See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Highland Park, Inc. v. United States*, 161 F. Supp. 597 (Ct. Cl. 1958). As to the effect of continuous exposure to loud noise see *Time*, Jan. 2, 1961, p. 29.

³ In 1950, the Federal Aviation Agency air towers reported that air carriers alone were responsible for approximately four million operations. By 1960, this figure was increased to approximately seven million. *Aviation Week and Space Technology*, May 1, 1961, p. 95.

⁴ Weibel, *Problems of Federalism in the Air Age—Part I*, 24 J. AIR L. & COM. 127, 128 (1957). The glide angle is defined as the number of feet of horizontal movement necessary for each foot of ascent or descent. Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313, 1314 (1958).

⁵ Note, 74 HARV. L. REV. 1581, 1582-84 (1961).

⁶ *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).